

## Message Text

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FOR OES/APT, L, EB: PASS NTIA (DOC), NBS, OSTP

E.O. 11652 N/A  
TAGS: TGEN, OECD  
SUBJECT: FIRST MEETING OF EXPERTS GROUP ON TRANS-  
BORDER DATA BARRIERS AND PRIVACY PROTECTION, OECD  
APRIL 3-4, 1978

SUMMARY: THE NEW GROUP ON TRANSBORDER DATA BARRIERS  
AND PRIVACY PROTECTION, SUCCESSOR TO THE DATA BANK  
PANEL, MET AT OECD APRIL 3-4, 1978, UNDER THE  
CHAIRMANSHIP OF MR. JUSTICE KIRBY OF AUSTRALIA.  
DISCUSSION CENTERED ON THE BEST METHODS FOR DIS-  
CHARGING THE TWO-PART MANDATE GIVEN THE GROUP BY  
THE CSTP AND TO AN ANALYSIS OF THE RELATIVE PRIORITY  
AND APPROACH TO TASKS OF WORK PROGRAM. IT WAS DECI-  
DED TO CREATE A DRAFTING PARTY COMPOSED OF THE U.S.  
AND SEVEN OTHER COUNTRIES, BALANCED BETWEEN COUNCIL  
OF EUROPE AND NON-COUNCIL OF EUROPE MEMBERS, TO  
CONCENTRATE ON DRAFTING GUIDELINES FOR HARMONIZING  
INTERNATIONAL EFFORTS IN THE TRANSBORDER FLOW OF  
PERSONAL DATA. SECONDARILY, THE GROUP WILL CONSIDER  
THE BROADER SOCIAL AND ECONOMIC ASPECTS OF ALL KINDS  
OF TRANSBORDER DATA FLOWS. THE MEETING WAS CON-  
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DUCTED IN AN ATMOSPHERE OF GOODWILL AND COOPERATION,  
IN SPITE OF DISTINCT DIFFERENCES OF EMPHASIS AND  
INTERESTS AMONG THE PARTICIPANTS. THE NEXT MEETING  
OF THE FULL GROUP IS SCHEDULED FOR DECEMBER 7-8  
1978. END SUMMARY.

1. THE NEW EXPERTS GROUP ON TRANSBORDER DATA BARRIERS

AND PRIVACY PROTECTION, CREATED BY THE CSTP AT ITS FEBRUARY MEETING ON THE RECOMMENDATION OF THE ICCP, MET AT OECD APRIL 3-4, 1978. THE GROUP ELECTED MR. J.M. KIRBY (AUSTRALIA) AS CHAIRMAN, AND MR. G. STADLER (AUSTRIA), MR. L. JOINET (FRANCE), AND MR. W. FISHMAN (U.S.) AS VICE-CHAIRMEN. MR. KIRBY IS CHAIRMAN OF AUSTRALIA'S LAW REFORM COMMISSION, WHICH ALSO DEALS WITH PRIVACY ISSUES AND THE VICE-CHAIRMEN EACH HAVE CONSIDERABLE BACKGROUND IN OECD'S PRIOR ACTIVITIES IN THIS AREA. IN VIEW OF THE NEWNESS OF THE GROUP, THE OECD STAFF PROVIDED BACKGROUND ON THE HISTORY OF OECD INVOLVEMENT IN THE TRANSBORDER DATA FLOW AND PRIVACY PROTECTION ISSUES, AND THE MEMBERS OF THE GROUP INTRODUCED THEMSELVES WITH A BRIEF DISCUSSION OF THEIR INDIVIDUAL RESPONSIBILITIES. ABOUT HALF THE DELEGATES HAD PRIOR EXPOSURE TO ICCP AND THE NOW-TERMINATED DATA BANK PANEL.

2. THE PRIMARY FOCUS OF THE GROUP'S DISCUSSION WAS ON THE IMPLEMENTATION OF THE MANDATE ASSIGNED TO THE GROUP BY THE CSTP. IN ESSENCE, THE MANDATE CALLS ON THE GROUP TO "DEVELOP GUIDELINES ON BASIC RULES GOVERNING THE TRANSBORDER FLOW AND THE PROTECTION OF PERSONAL DATA AND PRIVACY, IN ORDER TO FACILITATE A HARMONIZATION OF NATIONAL LEGISLATIONS, WITHOUT THIS PRECLUDING AT A LATER DATE THE ESTABLISHMENT OF AN INTERNATIONAL CONVENTION". DSTI/ICCP/78.6 PAR. 4 (I). THE MANDATE ALSO UNCLASSIFIED

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DIRECTS THE GROUP TO "INVESTIGATE THE LEGAL AND ECONOMIC PROBLEMS RELATING TO THE TRANSBORDER FLOW OF NON-PERSONAL DATA, IN ORDER TO PROVIDE A BASIS FOR THE DEVELOPMENT OF GUIDELINES IN THIS AREA WHICH SHOULD TAKE INTO ACCOUNT THE PRINCIPLES OF FREE FLOW OF INFORMATION" DSTI/ICCP/78.6 PAR 4 (II).

3. NUMEROUS QUESTIONS WERE RAISED BY THE DELEGATES, PARTICULARLY RELATING TO IMPOSITION OF A DEADLINE OF JULY 1, 1979 ON PART 4 (I) OF THE MANDATE. THESE

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QUESTIONS MAY BE SUMMARIZED AS FOLLOWS:

- A) WHICH OF THE TWO TASKS IS TO HAVE PRIORITY ?
- B) HOW DO THE TWO TASKS RELATE TO EACH OTHER ?
- C) WHAT IS THE RELATIONSHIP OF THE TASKS TO THE ICCP'S WORK (ESPECIALLY 4 (II)), AND THE BROADER OBJECTIVES OF OECD ?
- D) WHAT IS THE RELATIONSHIP OF THE TWO TASKS TO THE WORK OF THE COUNCIL OF EUROPE IN THIS AREA ?
- E) HOW IS THE GROUP TO ACCOMPLISH ITS TASKS ?
- F) WHAT DOES THE LANGUAGE OF 4 (I) MEAN IN CONCRETE TERMS.

MR. JOINET, THE FRENCH DELEGATE, PLAYED A VERY ACTIVE ROLE IN THE ENTIRE DISCUSSION, ARGUING, IN FORCEFUL TERMS, FOR THE GROUP TO GIVE SERIOUS CONSIDERATION TO PART 4 (II) OF THE MANDATE, SINCE IN ANY EVENT NON-BINDING PRINCIPLES ELABORATED IN RESPONSE TO PART 4 (I) DO NOT ADEQUATELY MEET THE NEED FOR CONCRETE, PRACTICAL INTERNATIONAL ACTION. HE WAS SUPPORTED IN THIS APPROACH GENERALLY BY OTHER EUROPEAN DELEGATES SOME OF WHOM EXPRESSED SUPPORT FOR RAPID ACTION, TOGETHER WITH THE COUNCIL OF EUROPE, OR ON THE BASIS OF THE EXISTING COUNCIL OF EUROPE'S DRAFT CONVENTION ON INTERNATIONAL PRIVACY PROTECTION.

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4. THE U.S. TOOK THE POSITION THAT THE PERSONAL PRIVACY AREA (PART 4 (I)) SHOULD HAVE PRIORITY WITHOUT, HOWEVER, IGNORING THE BROADER SOCIAL AND ECONOMIC ASPECTS OF ALL DATA FLOWS. WHILE SUPPORTING THE CONCEPT THAT THE WORK OF THE COUNCIL OF EUROPE AND PRIOR OECD WORK ARE ALL QUITE RELEVANT TO THE IMMEDIATE TASK, THE U.S. RESISTED THE IDEA THAT ANY DRAFTING IN CONNECTION WITH 4 (I) SHOULD BEGIN WITH AND BUILD UPON THE EXISTING

COUNCIL OF EUROPE DRAFT CONVENTION OR THE 1973-74 RESOLUTIONS OF THE COUNCIL OF EUROPE DEALING WITH INTERNATIONAL PRIVACY PROTECTION. THE U.S. ARGUED THAT PART 4 (I) OF THE MANDATE MUST HAVE PRIORITY, IN VIEW OF THE DEADLINE IMPOSED BY THE CSTP, AND THAT THE DRAFTING SHOULD REPRESENT A FRESH, ALBEIT AN INFORMED APPROACH. THE U.S. NOTED THAT TALK OF ANY BINDING INTERNATIONAL INSTRUMENTS, MUCH LESS OF A FORMAL TREATY OR CONVENTION, WAS NOT WITHIN THE SCOPE OF THE MANDATE AND WAS PREMATURE IN LIGHT OF THE ADMITTED NEED TO DO FURTHER RESEARCH ON SOCIAL AND ECONOMIC ASPECTS OF INTERNATIONAL DATA FLOWS.

5. SOME DISCUSSION TOOK PLACE ON THE STATUS OF PREVIOUSLY PREPARED STUDIES SUCH AS THAT BY LOGICA, AND THOSE CARRIED OUT BY THE U.S., CANADA AND AUSTRALIA, AMONG OTHERS. IT WAS APPARENT THAT MANY DELEGATES, BEING NEW TO THE PRIOR OECD WORK IN THIS AREA, WILL FIND IT NECESSARY TO FAMILIARIZE THEMSELVES WITH THESE STUDIES BEFORE THEY CAN CONTRIBUTE SIGNIFICANTLY TO THE GROUP.

IT WAS SUGGESTED THAT THE SECRETARIAT CARRY OUT A NUMBER OF TASKS, INCLUDING A COMPENDIUM OR SYNOPSIS OF EXISTING AND IMMINENT NATIONAL LAW OR REGULATIONS IN UNCLASSIFIED

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THE MEMBER COUNTRIES. THE SECRETARIAT ALSO AGREED TO PREPARE A BACKGROUND SUMMARY OF PRIOR WORK IN THE FIELD, A SYNOPSIS OF THE ISSUES, AND A GUIDE TO POSSIBLE APPROACHES TO "HARMONIZATION".

6. MEMBER COUNTRIES PROVIDED AN UPDATE ON ACTIVITIES IN THEIR COUNTRIES BEYOND THOSE SET FORTH IN AN EARLIER OECD DOCUMENT. THE U.S. STRESSED THE WORK OF THE INTER-AGENCY TASK FORCE ON TRANSNATIONAL DATA FLOW, THE FIRST MEETING OF THE GOVERNMENT-INDUSTRY ADVISORY SUBCOMMITTEE ON THE SAME SUBJECT, AND THE CREATION OF A NEW AGENCY, THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION IN THE DEPARTMENT OF COMMERCE. REPORTS BY OTHER COUNTRIES SEEMED TO HIGHLIGHT THE INCREASING ATTENTION BEING GIVEN TO THE APPLICATION OF DATA PROTECTION PRINCIPLES TO LEGAL PERSONS, AS DISTINGUISHED FROM NATURAL PERSONS. THIS DEVELOPMENT WHICH MAY BE CONSIDERED TO BE, IN EFFECT, A SECOND STAGE OF INTERNATIONAL CONCERN FOR DATA CONTROL, HAS IMPORTANT IMPLICATIONS FOR U.S. POLICY AND PARTICULARLY FOR THE IMPACT OF SUCH DEVELOPMENTS ON U.S. INDUSTRY.

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7. IT WAS GENERALLY AGREED THAT DEVELOPING DATA ON INTERNATIONAL DATA PROCESSING, BOTH QUANTITATIVE AND QUALITATIVE, WILL BE DIFFICULT AND INVOLVES PIONEERING EFFORTS. HOWEVER, IT WAS RECOGNISED THAT SUCH WORK WOULD BE RELEVANT NOT ONLY TO THE SECOND PART OF THE GROUP'S MANDATE BUT ALSO TO THE BROADER ISSUE BEING ADDRESSED IN THE ICCP DOCUMENT (DSTI/ICCP/78.12, PAR. 12, ITEM 3). NEVERTHELESS, THE FRENCH INDICATED THAT A PRELIMINARY STUDY SUGGESTED THAT MORE THAN 60 PERCENT OF THE CURRENT FLOW CONCERNS MANUAL FILES. DISCUSSION TOOK PLACE ON THE IMPORTANT IMPLICATION OF GOVERNMENT TAXING OF DATA EXCHANGES THROUGH CUSTOMS REGULATIONS.

MR. JOINET, IN HIS ROLE OF CHAIRMAN OF THE COUNCIL OF EUROPE DRAFTING GROUP, NOTED THAT THE EUROPEAN COMMUNITY IS WITHOLDING FURTHER REGULATORY ACTION ON THE SUBJECT UNTIL THE OUTCOME OF THE COUNCIL OF EUROPE WORK IS CLEAR. HE NOTED, HOWEVER, THAT IF THE COUNCIL OF EUROPE WORK IS NOT SUCCESSFUL FOR POLITICAL REASONS, THE EC WOULD PROMPTLY MOVE TO ADOPT A BINDING DIRECTIVE ON ITS MEMBERS.

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8. AFTER UNDULY EXTENDED DISCUSSION, THE GROUP AGREED TO ESTABLISH A DRAFTING PARTY MADE UP OF THE FOLLOWING COUNTRIES, U.S., SWEDEN, FRANCE, FRG, CANADA, AUSTRIA, U.K., AND AUSTRALIA. THE DRAFTING PARTY IS TO GIVE PRIORITY TO HARMONIZING PERSONAL DATA-FLOW LAWS, TO CONSIDER INTERNATIONAL LEGAL CONFLICTS AND COMPETENCIES AS WELL AS BASIC GUIDELINES, AND TO REPORT TO THE FULL GROUP ONE MONTH PRIOR TO ITS NEXT MEETING. THE NEXT MEETING OF THE GROUP WAS SET FOR DECEMBER 7-8, 1978; THE DRAFTING PARTY IS TO MEET 11-12 JULY, 1978, AND ONCE AGAIN PRIOR TO THE NEXT MEETING OF THE FULL GROUP.

9. COMMENT: MR. KIRBY PROVED TO BE AN ABLE AND EFFICIENT CHAIRMAN, AND THE MEETING WAS CONDUCTED IN AN ATMOSPHERE OF COOPERATION AND GOODWILL, NOTWITHSTANDING DIFFERENT EMPHASES AND APPROACHES. THE GROUP APPEARS TO HAVE A GOOD START AND ITS FURTHER PROGRESS WILL DEPEND PRIMARILY ON THE WORK OF THE DRAFTING PARTY AND ON THE COLLECTING, COLLATING AND SYNTHESIZING WORK OF THE SECRETARIAT, WHICH ALSO INTENDS TO USE SEVERAL QUALIFIED CONSULTANTS. THE WORK OF THE GROUP MERITS WASHINGTON'S CONTINUING ATTENTION AND SUPPORT.  
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